# Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM) (NCvC)-1204–06 OF 2021 AND W-02(IM) (NCvC)-1205–06 OF 2021
AZIZAH NAWAWI, ABU BAKAR JAIS AND LEE HENG CHEONG JJCA
16 MARCH 2022

*Limitation — Accrual of cause of action — Breach of contract — Appellant challenged validity of amendment to clauses in sale and purchase agreements related to extension of time for delivery of vacant possession — Appellant claimed for liquidated ascertained damages — High Court struck out appellant's application for summary judgment — High Court allowed respondent's application under O 14A of Rules of Court 2012 — Whether appellant's claim for liquidated ascertained damages barred by limitation — Rules of Court 2012 O 14 & O 14A*

The respondent was a developer of a housing project whereas the appellant was the purchaser of two parcel units in the said project pursuant to sale and purchase agreements dated 11 July 2012 and 18 July 2012 ('the SPAs'). Due to its inability to complete the project and deliver the vacant possession within the period of 36 months as provided under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR'), the respondent had applied for extension of time ('the EOT') and the Ministry of Housing and Local Government had allowed the same whereby the period was extended to 54 months. It ought to be noted that cll 25 and 27 of the SPAs signed by the parties herein provided for the 54 months period and not the 36 months period. The project was eventually completed and the vacant possessions of both the parcel units purchased by the appellant were delivered to them although late. Despite the respondent had paid the liquidated ascertained damages ('LAD') for the late delivery, the appellant had on 18 June 2020 filed a claim for LAD outside the scope of the SPAs, based on the 36 months delivery period under Schedule H of the HDR. In support of the claim, the appellant had relied on the Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281. The appellant then filed an application for summary judgment pursuant to O 14 of the Rules of Court 2012 ('the ROC') whereas the respondent had filed an application pursuant to O 14A of the ROC. The High Court had allowed the respondent's application and struck out the appellant's application for summary judgment premised on the following grounds: (a) that the appellant's claim was time-barred; (b) that the appellant was required to challenge the EOT by way of judicial review; and (c) that there was waiver or estoppel against social legislations. Dissatisfied with the decision, the appellant filed the present appeals. The issue arose was

whether the appellant's claim for the LAD was statute barred.

**Held**, dismissing the appeals with cost:

(1) The appellant in the present appeals was challenging the validity of the purported amendment to both cll 25 and 27 of the SPAs. The contractual breach that the appellant was complaining about was the purported amendment to both cll 25 and 27 of the SPAs. Since the appellant was challenging both cll 25 and 27 of the SPAs from the inception or execution of the SPAs, then the appellant's cause of action started from the date of the execution of the SPAs, that was, on 11 July 2012 and 18 July 2012 respectively. Therefore, the court agreed with the learned High Court judge that the appellant's claim which was filed on 18 June 2020 was barred by limitation, as the six-year period had expired on 10 July 2018 and 17 July 2018 respectively (see paras 33–34).

**[Bahasa Malaysia summary**

Responden merupakan pemaju projek perumahan manakala perayu adalah pembeli dua unit perumahan dalam projek tersebut menurut perjanjian jual beli bertarikh 11 Julai 2012 dan 18 Julai 2012 ('PJB tersebut'). Disebabkan ketidakmampuannya untuk menyiapkan projek dan menyerahkan milikan kosong dalam tempoh 36 bulan seperti yang diperuntukkan di bawah Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('PPKP'), responden telah memohon lanjutan masa ('EOT') dan Kementerian Perumahan dan Kerajaan Tempatan telah membenarkan permohonan tersebut di mana tempoh tersebut dilanjutkan kepada 54 bulan. Perlu diingatkan bahawa klausa 25 dan klausa 27 PJB tersebut yang ditandatangani oleh pihak-pihak memperuntukkan tempoh 54 bulan dan bukannya tempoh 36 bulan. Projek tersebut akhirnya siap dan milikan kosong kedua-dua unit perumahan yang dibeli oleh perayu telah diserahkan kepada mereka walaupun lewat. Walaupun responden telah membayar ganti rugi tertentu dan ditetapkan ('LAD') untuk penyerahan lewat, perayu telah pada 18 Jun 2020 memfailkan tuntutan LAD di luar skop PJB tersebut, berdasarkan tempoh serahan 36 bulan di bawah Jadual H PPKP. Bagi menyokong tuntutan tersebut, perayu telah bergantung kepada kes Mahkamah Persekutuan *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281. Perayu kemudian memfailkan permohonan untuk penghakiman terus menurut A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') manakala responden telah memfailkan permohonan menurut A 14A KKM 2012. Mahkamah Tinggi telah membenarkan permohonan responden dan menolak permohonan perayu untuk penghakiman terus berdasarkan alasan-alasan berikut: (a) bahawa tuntutan perayu telah dihalang oleh had masa; (b) bahawa perayu dikehendaki mencabar EOT tersebut melalui semakan kehakiman; dan (c) bahawa terdapat penepian atau estoppel terhadap

perundangan-perundangan sosial. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan-rayuan semasa. Isu yang timbul ialah sama ada tuntutan perayu untuk LAD dihalang oleh had masa.

**Diputuskan**, menolak rayuan-rayuan dengan kos:

(1) Perayu dalam rayuan-rayuan semasa telah mencabar keabsahan pindaan yang didakwa di buat ke atas kedua-dua klausa 25 dan klausa 27 PJB tersebut. Pelanggaran kontrak yang diadukan oleh perayu adalah berkenaan pindaan yang dikatakan dibuat ke atas kedua-dua klausa 25 dan klausa 27 PJB. Memandangkan perayu mencabar kedua-dua klausa 25 dan klausa 27 PJB dari permulaan atau pelaksanaan PJB, maka kausa tindakan perayu bermula dari tarikh PJB tersebut ditandatangani, iaitu masing-masing pada 11 Julai 2012 dan 18 Julai 2012. Oleh itu, mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa tuntutan perayu yang difailkan pada 18 Jun 2020 telah dihalang oleh had masa, kerana tempoh enam tahun telah tamat pada 10 Julai 2018 dan 17 Julai 2018 (lihat perenggan 33–34).]

**Cases referred to**

*Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)

*CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor* [2018] 3 MLJ 689, FC (refd)

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)

*Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, SC (folld)

*Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 635; [2003] 1 CLJ 527, HC (refd)

*Nasri v Mesah* [1971] 1 MLJ 32, FC (refd)

*Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd* [2002] MLJU 120; [2002] 4 CLJ 301, HC (refd)

**Legislation referred to**

Companies Act 2016

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989 reg 11(1), (3), Schedule H

Limitation Act 1953 s 6(1)

Rules of Court 2012 O 14, O 14A

**Appeal from:** *Obata Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other cases* [2022] 9 MLJ 212 (High Court, Kuala Lumpur)

*Wong Renn Xin (KL Wong) for the appellant.*
*Lai Chee Hoe (Ooi Xin Yi with him) (Chee Hoe & Assoc) for the respondent.*

**Azizah Nawawi JCA:**

INTRODUCTION

**[1]** There are two appeals before this court:

(a) Civil Appeal No W-02(IM)(NCvC)-1204–06 of 2021 is an appeal against the decision of the High Court to strike out the appellant's application for summary judgment under O 14 of the Rules of Court 2012 ('Appeal 1204'); and

(b) Civil Appeal No W-02(IM)(NCvC)-1205–06 of 2021 is an appeal against the decision of the High Court judge to allow the respondent's application under O 14A of the Rules of Court 2012 ('Appeal 1205').

**[2]** The appellant was the plaintiff at the High Court and the respondent was the defendant. Parties will be referred to as they were at the High Court hereafter.

THE SALIENT FACTS

**[3]** The defendant is a company incorporated in Malaysia under the Companies Act 2016, and is the developer of the housing project, The Sentral Residences ('The Sentral Residences'):

**[4]** In view of the magnitude of the housing project, the defendant had applied to the Ministry of Housing and Local Government ('the Ministry') for an extension of time to complete the project. In exercising its powers under reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR 1989'), on or about 16 December 2010, the Ministry granted an extension of time ('EOT') to complete the Housing Project, from a period of 36 to 54 months. The EOT granted by the Ministry is reflected in cll 25 and 27 of the sale and purchase agreements, subsequently entered into by the defendant and the purchasers of The Sentral Residences.

**[5]** The plaintiff, as the purchaser had entered into a prescribed statutory sale and purchase agreement ('SPA') with the defendant for the purchase of two parcel units ('the said property') in the residential project, The Sentral Residences, and the particulars are as follows:

| Purchaser's Name | Unit No | Date of SPA | Purchase Price (RM) |
|---|---|---|---|
| OBATA-AMBAK HOLDINGS SDN BHD | A-31-G (A-31-7) | 11 July 2012 | RM2,126,000 |
| OBATA-AMBAK HOLDINGS SDN BHD | A-31-F (A-31-6) | 18 July 2012 | RM1,662,000 |

**[6]** The SPAs, signed on 11 July 2012 and 18 July 2012 respectively, between the parties was in the prescribed statutory form under Schedule H of the HDR 1989, as mandated by reg 11(1) of the HDR 1989.

**[7]** It is not in dispute that the plaintiff had voluntarily entered into the SPAs on 11 July 2012 and 18 July 2012 respectively, for the two parcels, where the prescribed time of 54 months for delivery was clearly reflected in cll 25 and 27 of the SPAs:

> Clause 25 Time for delivery of Vacant Possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar months from the date of this Agreement.
>
> (2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in sub-clause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid immediately upon the date the Purchaser takes vacant possession of the said Parcel.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

27. Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities.

**[8]** Thereafter, upon the completion of the development, the defendant issued the notice for vacant possession dated 25 January 2017 to the plaintiff. The plaintiff is deemed to have taken possession on 8 February 2017, pursuant to cl 26(3) of the SPAs.

**[9]** There was a late delivery of the properties under the SPAs. Before filing this suit, the plaintiff had accepted liquidated ascertained damages ('LAD') from the defendant for late delivery under cll 25 and 27. Payment of RM10,017.53 was made in respect of parcel A-31-F and RM16,891.51 in respect of parcel A-31-G via two settlement letters, both dated 14 March 2017.

**[10]** Based on the decision of the Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, the plaintiff took the position that it is entitled to claim LAD outside the scope of the SPAs, based on the 36 months delivery period under Schedule H of the HDR 1989, and the details of the LAD are as follows:

| Purchaser's Name | Unit No | Purchase Price x % x Total Number of Days Late / 365 Days (RM) | LAD (RM) |
|---|---|---|---|
| OBATA-AMBAK HOLDINGS SDN BHD | A-31-G (A-31-7) | RM2,126,000 x 10% x (550/365) = RM320,356.16<br>RM2,126,000 x 2% x (550/365) = RM64,071.23 | RM384,427.39 |
| OBATA-AMBAK HOLDINGS SDN BHD | A-31-F (A-31-6) | RM1,662,000 x 10% x (550/365) = RM250,438.36<br>RM1,662,000 x 2% x (550/365) = RM50,087.67 | RM300,526.03 |
| | | TOTAL | RM684,953.42 |

**[11]** Despite accepting the LAD from the defendant based on the SPAs, the plaintiff then commenced these proceedings against the defendant, seeking for the following reliefs:

(a) Satu deklarasi bahawa apa-apa surat yang diberikan untuk perlanjutan masa (jika ada) di bawah peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 untuk Defendan untuk menyerahkan milikan kosong ('vacant possession') Hartanah tersebut kepada plaintiff dan melengkapkan kemudahan bersama ('common facilities') dari tempoh masa tiga puluh enam (36) bulan ke lima puluh empat (54) bulan adalah tidak sah selaras dengan keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162;

(b) Satu deklarasi bahawa Defendan adalah dikehendaki mematuhi dan terikat kepada Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 untuk menyerahkan milikan kosong ('vacant possession') Hartanah tersebut kepada plaintiff dan melengkapkan kemudahan bersama ('common facilities') dalam tempoh masa tiga puluh enam (36) bulan dikira dari tarikh Perjanjian Jual Beli tersebut ditandatangani;

(c) Satu perintah bahawa Defendan dikehendaki membayar kepada plaintiff untuk ganti rugi tertentu untuk kelewatan penyerahan milikan kosong ('vacant possession') Hartanah tersebut dan pelengkapan kemudahan bersama ('common facilities') seperti berikut:

(i) Defendan adalah diperintahkan untuk membayar kepada Plaintif

jumlah wang sebanyak RM684,953.42;

(ii) Faedah pada kadar 5% setahun ke atas jumlah RM684,953.42 dikira dari tarikh tindakan ini difailkan sehingga tarikh pembayaran penuh.

**[12]** On 7 August 2020, the plaintiff filed the application for summary judgment against the defendant ('SJ application') under the Rules of Court 2012 ('the ROC 2012'). On 20 November 2020, the defendant filed an application under O 14A of the ROC 2012 to determine the plaintiff's case on questions of law ('14A application').

## DECISION OF THE HIGH COURT

**[13]** On 18 May 2021, the learned High Court judge delivered his decision. The learned judge had allowed the defendant's O 14A of the ROC 2012 application and struck out the summary judgment application by the plaintiff, primarily based on the following grounds:

(a) that the plaintiff's claim is time-barred;

(b) that the plaintiff is required to challenge the EOT by way of judicial review; and

(c) that there is waiver or estoppel against social legislations.

## OUR DECISION

**[14]** The central feature of appellate intervention is trite, that is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. *The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside*

*on appeal.* This is consistent with the established plainly wrong test. (Emphasis added.)

**[15]** In another case, the Federal Court in *CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor* [2018] 3 MLJ 689 held as follows:

> [38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence (see Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (Emphasis added.)

**[16]** Bearing in mind the above cases, we will now deal with the issues raised by the parties.

*Issue (i) — Whether the plaintiff's claim for LAD is statute barred*

**[17]** Parties are on common ground that there are no dispute with regard to the material facts. This can be seen from the plaintiff's application for summary judgment and the defendant's application under O 14A of the ROC 2012. In fact, the crux of both appeals is on the issue of limitation. If this court finds that the plaintiff's claim is filed within the limitation period, both appeals should be allowed. However, if the plaintiff's claim is barred by limitation, then both appeals should be dismissed.

**[18]** Before we consider the submissions of both parties on this issue, it is instructive for us to refer to the meaning of a 'cause of action' in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, where it was held as follows:

> What then is the meaning of 'a cause of action'? *A 'cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action.* Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the plaintiff/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the defendant/defendant's act. (Emphasis added.)

**[19]** In *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court recognises that the right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an action could be

brought and from the date when that right is infringed or there is a threat of its infringement:

> *A 'cause of action' is the entire set of facts that gives rise to an enforceable claim*; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 131). In *Reeves v Butcher* (1891) 2 QB 590 511 Lindley LJ said: 'This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; *but it has always been held that the statute runs from the earliest time at which an action could be brought.*
>
> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 *at p 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach.* In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v Guild* 8 QBD 296 at p 302). *In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see Bolo's case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.* (Emphasis added.)

**[20]** As such, where the cause of action is founded on contract, time runs from the date of the breach of the contract. Since the plaintiff's claim for LAD is premised on contract, the provision on limitation under s 6(1) of the Limitation Act 1953 expressly provides that:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort

**[21]** In the present appeals, it is the submission of the plaintiff that their cause of action to claim for LAD shall accrue on the date the plaintiff takes vacant possession of the properties. This is based on cl 25(3) of the SPA, which reads as follows:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser take vacant possession of the said Parcel.

**[22]** It is therefore the submission of the plaintiff that the cause of action shall accrue on the date when the plaintiff/purchaser is deemed to have taken delivery of vacant possession of the properties. For the plaintiff, the cause of action accrued on 8 February 2017 (VP notice + 14 days) and the six years

limitation period shall expire on 7 February 2023. In the present action, since the plaintiff's claim herein was filed on 18 June 2020, it is therefore well within the limitation period.

**[23]** The plaintiff relied on the decision of the High Court in *Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd* [2002] MLJU 120; [2002] 4 CLJ 301, where Arifin Zakaria J (later CJM) held as follows:

> It would appear that based on cl 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

**[24]** The case of *Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd* was followed in *Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 635; [2003] 1 CLJ 527, where Heliliah Mohd Yusoff J (later FCJ) echoed the same view as follows:

> The background facts of the case is also similar to the present one and the clauses considered by the court are also in pari materia. The learned judge Ariffin Zakaria J, as he then was, premised his decision that the core issue in the case turns on the construction of cl 22(2) of the agreement in that case and the clause was as follows:
>
> > 22.(2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of twelve per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises.
>
> In his judgment the learned judge stated:
>
> > It would appear that based on cl 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

**[25]** We wound agree with the plaintiff/appellant if the plaintiff's claim for LAD is simply based on cll 25 and 27 of the SPAs, where the delivery period of the properties was agreed/contracted at 54 months.

**[26]** However, the plaintiff's claim herein is not based on cll 25 and 27 of the SPAs which the parties have signed. The plaintiff's cause of action can be seen from paras 6, 7, 8 and 9 of the statement of claim, which are as follows:

> 6. Perjanjian jual beli tersebut yang ditandatangani antara Plaintif dan Defendan adalah tidak mengikut peruntukan undang-undang yang sedia ada dan/atau telah melanggari bentuk perjanjian jual beli di bawah jadual H sebagaimana yang diperuntukkan di bawah Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan

A Pelesenan) 1989 di mana *tempoh masa penyerahan milikan kosong telah dipinda dari tempoh masa tiga-puloh enam (36) bulan kepada lima puloh empat (54) bulan*.

7. *Defendan telah bertindak secara salah dan/atau telah melanggari peruntukan undang-undang* yang sedia ada iaitu Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan
B Pelesenan) 1989 *dengan meminda tempoh masa penyerahan milikan kosong daripada tiga-puloh enam (36) bulan kepada lima puloh empat (54) bulan.*

8. Oleh itu apa-apa pindaan yang dibuat oleh Defendan dalam Perjanjian Jual Beli tersebut yang bercanggahan dengan jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 adalah tidak sah dan tidak mengikat
C Plaintif.

9. Justeru itu, Defendan adalah masih terikat untuk menyerahkan belikan kosong dalam tempoh masa tiga puloh enam (36) bulan selaras dengan jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. (Emphasis added.)
D

**[27]** From the above pleadings, it is the pleaded case of the plaintiff that the SPAs, which were executed by both the plaintiff and the defendant on 11 July 2012 and 18 July 2012 respectively, had breached Schedule H of the
E HDR1989 when the period to deliver vacant possession of 36 months *was amended* to 54 months.

**[28]** The plaintiff further claimed that by the said amendment, the defendant had breached the Housing Development (Control and Licensing)
F Act 1966 and Schedule H of the HDR 1989. Therefore, the said amendment (that is, amending the delivery period from 36 to 54 months), which is in breach of Schedule H of the HDR 1989, is invalid and is not binding on the plaintiff. As such, the defendant is still bound to deliver vacant possession within 36 months, not 54 months as stipulated in the SPAs that was executed
G by the parties.

**[29]** Therefore, in gist, on its pleaded case, the plaintiff's cause of action is that:

H (a) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and

(b) that the defendant has breached Schedule H of the HDR 1989, by amending the time for delivery of vacant possession from 36 months to 54 months.

I

**[30]** Based on the above mentioned pleadings, the plaintiff therefore applied for a declaration that the EOT granted by the Ministry in 2010 is invalid premised on the decision of the Federal Court in *Ang Ming Lee* and a declaration that the defendant is bound by Schedule H of the HDR1989 to

deliver vacant possession within 36 months from the date of execution of the SPAs.

**[31]** It is not in dispute that when the plaintiff executed the SPAs, both cll 25 and 27 specified that vacant possession shall be delivered within 54 months from the date of the signing of the SPAs. It is also not in dispute that the plaintiff did not make any allegation of fraud against the defendant.

**[32]** Therefore, what the plaintiff is now claiming is that the defendant had purportedly amended both cll25 and 27 of the SPAs, from 36 months to 54 months based on the EOT granted by the Ministry on/around 16 December 2010. This amendment was made to all the SPAs, for the purpose of selling all the parcels of The Sentral Residences, and this amendment was made before the plaintiff executed the SPAs. This amendment, which was made to the SPAs, according to the plaintiff, is in breach of Schedule H of the HDR 1989, and is therefore invalid. This can also be seen from the written submissions of the plaintiff, inter alia:

> 2.8 *The Developer amended the completion period from thirty-six (36) months to fifty-four (54) months in the prescribed statutory form in Schedule H*. At the time of execution of the SPA, the Developer did not inform the Purchaser that there was an EOT purportedly granted by the Controller of Housing ('the Controller') to extend the completion period.
>
> ...
>
> 2.12 *In short, the Purchaser's case is that the Developer did not pay the full LAD amount calculated based on 36 months completion period as required by Schedule H of HDR 1989* which the Purchaser is entitled in law to receive the full statutory LAD. (Emphasis added.)

**[33]** In other words, the plaintiff is challenging the validity of both cll 25 and 27 of the SPAs, from the date of the signing/execution of the SPAs. This challenge is premised on a breach of Schedule H of the HDR 1989, as interpreted by the Federal Court in *Ang Ming Lee*. The plaintiff is therefore challenging the validity of the purported amendment to both cll 25 and 27 of the SPAs, from the inception or execution of the SPAs. The contractual breach that the plaintiff is complaining about is the purported amendment to both cll 25 and 27 of the SPAs (see *Nasri v Mesah*). Since the plaintiff is challenging both cll 25 and 27 of the SPAs from the inception or execution of the SPAs, then the plaintiff's cause of action runs from the date of the execution of the SPAs, that is, on 11 July 2012 and 18 July 2012 respectively.

**[34]** Therefore, we agree with the learned judge that the plaintiff's claim is barred by limitation, as the six year period had expired on 10 July 2018 and 17 July 2018 respectively. Since this suit was filed on 18 June 2020, limitation has already sets in. On this ground alone, we would dismiss both appeals with cost.

*Appeals dismissed with cost.*

Reported by Dzulqarnain Ab Fatar